

2005 DRAFTING REQUEST

Bill

Received: **01/18/2005**

Received By: **rryan**

Wanted: **As time permits**

Identical to LRB:

For: **Administration-Budget**

By/Representing: **Milioto**

This file may be shown to any legislator: **NO**

Drafter: **rryan**

May Contact:

Addl. Drafters:

Subject: **Health - facility licensure**

Extra Copies: **DAK**

Submit via email: **NO**

Pre Topic:

DOA:.....Milioto -

Topic:

BB0440 FBI background check for caregivers

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?				_____			State
/1	rryan 01/18/2005	csicilia 01/19/2005	jfrantze 01/20/2005	_____	sbasford 01/20/2005		State
/2	rryan 01/21/2005	csicilia 01/21/2005	rschluet 01/21/2005	_____	mbarman 01/24/2005		

FE Sent For:

<END>

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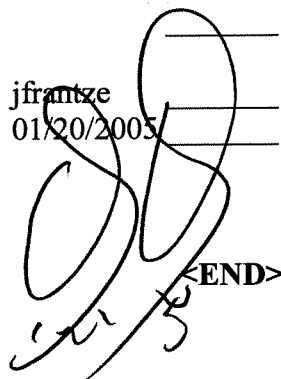
Instructions:

See Attached

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/?	rryan	1/19 05	1/19	1/20			

FE Sent For:

<END>

2005-07 Budget Bill Statutory Language Drafting Request

- Topic: Employer Immunity Legislation
- Tracking Code: BB0440
- SBO team: Health
- SBO analyst: Steve Milioto
 - Phone: 266-8593
 - Email: steve.milioto@doa.state.wi.us
- Agency acronym: DHFS
- Agency number: 435

Attn: Robin Ryan

Per your request, I am sending
this over as a separate
draft request.

Best,
Steve

Employer Immunity Legislation

Current Language

Current statutory language (s. 50.065) states that the department may not license, certify, issue a certificate of approval to or register a person to operate an entity or continue the license, certification, certificate of approval or registration of a person to operate an entity or employ or contract with a caregiver or permit to reside at the entity a nonclient resident if the department knows or should have known if the person has been convicted of: a serious crime, the person has abused or neglected any client or misappropriated the property of any client, the person has abused or neglected a child, or if the person's credential is not current or is limited so as to restrict the person from providing adequate care to a client. In addition, the entity may not employ staff with similar findings.

Proposed Change

The Department recently received approval to participate in a federal background check pilot program in which providers must obtain fingerprints of prospective employees. The federal Centers for Medicaid and Medicare Services (CMS) requires states to have certain provisions in state law as a condition of participation in the pilot. The Department requests the following statutory language changes. These changes would apply only to providers under s. 50.065 in pilot counties of Dane, Douglas, Kenosha, LaCrosse and Shawano only until the pilot sunsets on Sept. 30, 2007.

Request to create statutory language in s. 50.065 to require that a long-term care facility or provider that obtains information about a direct patient access employee from a federal background check use such information only for the purpose of determining the suitability of the employee for employment.

The Department also requests to create statutory language stating that employers participating in the federal criminal background check pilot program, funded by the CMS grant, who reasonably use the results of a federal background check for an employment, termination or licensing determinations are immune from all civil liability that may result from that determination.

Effect of the Change

The statutory language change ensures that employers in the pilot program using federal background checks for employment determinations use it only for the purpose of determining the suitability of the employee for employment. The language also ensures that employers are immune from civil liability suits resulting from employment, termination or licensing determinations.

Rationale for the Change

DHFS has received a grant from Center for Medicaid Services (CMS) funding federal background check pilots in five counties. The grant application requires legislation to ensure that employers in the pilot program using federal background checks for employment determinations use it only for the purpose of determining the suitability of the employee for employment. In addition, the grant application requires legislation to provide immunity to employers in the pilot program using federal background check information for employment determinations.

Desired Effective Date: Upon passage
Agency: DHFS
Agency Contact: Mark Resheske
Phone: 267-0356

Phone call to Steve 1/18/05
no need to apply restriction on use of
background info to other programs
for which FBI checks used - for example Kinship
Care

Project Abstract
Program for Background Checks for Employees with
Direct Access to Individuals Who Require Long Term Care

Overall Goals of the Project:

Wisconsin's participation in the federal background check pilot program will result in:

- Increased assurance that persons with direct access caregivers don't have convictions in other states.
- Data gathered to evaluate the effectiveness and impact of Wisconsin's Caregiver Law. The law has been in place for six years, but no baseline data exists on the number of convictions ("hits") or number of persons denied employment based on offense history.
- Data gathered to evaluate the effectiveness of conducting Federal Bureau of Investigation (FBI) fingerprint-based checks.

Pilot Program Description

- Wisconsin proposes to require long term care entities to conduct fingerprint-based federal background checks in five geographically-located counties, selected to participate based on representation of municipal and rural communities, high out-of-state movement and high commuting traffic. One county has been selected to represent small, rural counties with a stable workforce. The five pilot demonstration counties are Dane, Douglas, Kenosha, La Crosse and Shawano.
- Five control counties will be selected to gather data regarding the current caregiver background check results and entity employment decisions. Gathering this data will provide statistics to better research and compare the impact of Wisconsin's Caregiver Program versus the Federal Background Check Pilot Program.

Grant Use:

The federal background check pilot funds will be used in the following manner:

- Enhance the Department of Health and Family Services' automated Integrated Background Information System (IBIS)
- Fund the cost of obtaining digitalized fingerprint services, to access quality fingerprints and expedite the FBI background check results
- Fund the cost of conducting fingerprint-based background checks, versus name-based checks
- Fund the cost of conducting FBI background checks
- Provide technical training to pilot county entities
- Provide preventative abuse training to direct access caregivers

Federal Background Check Pilot Budget

• Program for Background Checks Budget 2005-2007	\$1,700,870
• Budget for Abuse Prevention Training Component	<u>\$ 858,260</u>
• Total Federal funds requested	\$2,559,130



State of Wisconsin
2005 - 2006 LEGISLATURE

LRB-17442

RLR:.....

gs

In 1/18/05

TODAY

DOA:.....Milioto - FBI background check for caregivers

FOR 2005-07 BUDGET - NOT READY FOR INTRODUCTION

RMR

Inserts

Do Not Gen

LPS -
Please
fix request
sheet
as indicated

A-Note

1

AN ACT/...; relating to: the budget.

Analysis by the Legislative Reference Bureau

HEALTH AND HUMAN SERVICES ✓

OTHER HEALTH AND HUMAN SERVICES ✓

Under current law, a long-term care provider, such as a residential care facility or a personal care worker agency, must obtain the Wisconsin arrest and conviction record of each caregiver who works for the provider. A provider may not employ or contract with a caregiver who has been convicted of a serious crime. If a caregiver is not a Wisconsin resident or resided outside Wisconsin before serving as a caregiver, a provider may request that the caregiver provide fingerprints that may be used to search criminal history records maintained by the Federal Bureau of Investigation (FBI).

This bill provides that if a long-term care provider obtains information from the FBI regarding a caregiver's arrest or conviction record, the provider may use the information only to determine whether the caregiver is disqualified from serving as a caregiver. The bill further provides that a provider is immune from civil liability to a caregiver for using arrest and conviction information provided by the FBI to make an employment determination regarding the caregiver. *Insert 1*

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

FE-S

Except
as provided
in par (c),

1 **SECTION 9121. Nonstatutory provisions; department of health and**
2 **family services.**

3 (1) CAREGIVER CRIMINAL HISTORY SEARCHES. (a) In this subsection:

4 1. "Caregiver" has the meaning given in section 50.065 (1) (ag) of the statutes.

5 2. "Entity" has the meaning given in section 50.065 (1) (c) of the statutes.

6 (b) An entity that receives information regarding the arrest or conviction of a
7 caregiver from the federal bureau of investigation in connection with a criminal
8 history search under section 50.065 of the statutes may use the information only to
9 determine whether the caregiver's arrest or conviction record disqualifies him or her
10 from serving as a caregiver. An entity is immune from civil liability to a caregiver
11 for using arrest ^{or} and conviction information provided by the federal bureau of
12 investigation to make an employment determination regarding the caregiver.

13 (c) This subsection does not apply after September 30, 2007. ✓

Paragraph (b) does not apply to use by
an entity of information that it requests
from the federal bureau of investigation
after September 30, 2007.

arrest or
conviction

INSERT 2

<end>

**2005-2006 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-1744/lins

RLR:j:....

gjs

Insert 1:

no 9 The limitation on use of arrest and conviction information and the civil immunity provision apply only to use of arrest and conviction information that a provider requests from the FBI before September 30, 2007.

Insert 2:

^

SECTION 1. 50.065 (2) (br) of the statutes is created to read:

50.065 (2) (br) 1. Except as provided in subd. 2, an entity that receives information regarding the arrest or conviction of a caregiver from the federal bureau of investigation in connection with a criminal history search under this section may use the information only to determine whether the caregiver's arrest or conviction record disqualifies him or her from serving as a caregiver. An entity is immune from civil liability to a caregiver for using arrest or conviction information provided by the federal bureau of investigation to make an employment determination regarding the caregiver.

2. Subdivision 1. does not apply to use by an entity of arrest or conviction information that the entity requests from the federal bureau of investigation after September 30, 2007.

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1744/2dn

RLR:.....

g's

Steve,

✓
This bill applies only to entities, as defined in s. 50.065 (1) (c), stats., not to DHFS. Should it apply to DHFS? The drafting instructions state that the civil immunity provision should apply to "licensing determinations" made by "employers." I did not apply the immunity provision to licensing determinations, because I assume that only DHFS makes licensing determinations. Please let me know if entities may also make licensing determinations. ✓

Should the bill explicitly prohibit entities from releasing information obtained from an FBI criminal background search? ✓

✓
The bill applies to all entities that conduct FBI criminal background searches under s. 50.065 (2) (bm), not just to entities in the pilot counties. I presume that entities currently do not conduct FBI searches and that only those in the pilot counties will do so during the pilot project. However, I did not want to create the inference that providers in non-pilot counties may conduct FBI searches under s. 50.065 (2) (bm) according to different standards than those that apply in the pilot counties. Should the bill create two standards? ✓

to
Do you want to include an initial applicability provision, for example that the bill first applies FBI background checks requested or completed on the effective date of the bill? If entities currently do not conduct FBI checks, then the initial applicability provision is not necessary.

Robin Ryan
Legislative Attorney
Phone: (608) 261-6927
E-mail: robin.ryan@legis.state.wi.us

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1744/1dn
RLR:cjs:jf

January 20, 2005

Steve,

This bill applies only to entities, as defined in s. 50.065 (1) (c), stats., not to DHFS. Should it apply to DHFS? The drafting instructions state that the civil immunity provision should apply to "licensing determinations" made by "employers." I did not apply the immunity provision to licensing determinations, because I assume that only DHFS makes licensing determinations. Please let me know if entities may also make licensing determinations.

Should the bill explicitly prohibit entities from releasing information obtained from an FBI criminal background search?

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Do you want to include an initial applicability provision, for example that the bill first applies to FBI background checks requested or completed on the effective date of the bill? If entities currently do not conduct FBI checks, then the initial applicability provision is not necessary.

Robin Ryan
Legislative Attorney
Phone: (608) 261-6927
E-mail: robin.ryan@legis.state.wi.us

Ryan, Robin

From: Milioto, Steve
Sent: Thursday, January 20, 2005 3:49 PM
To: Ryan, Robin
Cc: Resheske, Mark
Subject: FW: FW: LRB Draft: 05-1744/1 BB0440 FBI background check for caregivers

Hi Robin --

Please see Mark's comments below. I was only 3 for 4. Alas! Steve

-----Original Message-----

From: Resheske, Mark
Sent: Thursday, January 20, 2005 3:45 PM
To: Milioto, Steve
Cc: Woods, Otis; Dow, Susan; Forsaith, Andrew
Subject: Re: FW: LRB Draft: 05-1744/1 BB0440 FBI background check for caregivers

Hi Steve,

the language, as drafted, seems fine other than the comment about Paragraph 4.

Paragraph 1--it does not need to apply to DHFS. Yes, only DHFS makes licensing determinations for long term care providers in this pilot. Paragraph 2--No, because current care giver law allows sharing from employer to employer etc. and we don't want to take that away. Paragraph 3--Actually all entities can currently conduct FBI background searches under the current care giver law so we don't want 2 standards and we don't want to give that up (not many do because of the expense, but they are allowed). Paragraph 4--The initial applicability provision should just apply to pilot counties. Thanks and let me know if you have any questions,

Mark Resheske
OSF

>>> Milioto, Steve 01/20/05 01:50PM >>>
Hi Robin --

Per your drafter's note, here are my responses:

Paragraph 1 -- My reading of the request is that it does not pertain to DHFS.

Paragraph 2 -- I have no opinion on this so unless the department tells me otherwise, let's leave it as is.

Paragraph 3 -- I thought the department wanted the language to apply just to the participating counties. Mark, what is the department's opinion about this?

Paragraph 4 -- Again, I have no opinion about this unless the department wants it. Leave it as is for now.

When is the very last moment I can get changes to you? Best, Steve

-----Original Message-----

From: Frantzen, Jean [mailto:Jean.Frantzen@legis.state.wi.us]
Sent: Thursday, January 20, 2005 10:07 AM
To: Milioto, Steve
Cc: Johnston, James; Hanaman, Cathlene; Haugen, Caroline; Merry-Mason, Monica
Subject: LRB Draft: 05-1744/1 BB0440 FBI background check for caregivers

P/c to mark

① Clarify that providers may share FBI info

② Add an initial app.

*no reference to pilot counties
added in last*



~~LEGISLATURE~~
State of Wisconsin
2005 - 2006 LEGISLATURE

2
LRB-1744/1

RLR:cjs

Stays (RMR)

DOA:.....Milioto - BB0440 FBI background check for caregivers

FOR 2005-07 BUDGET -- NOT READY FOR INTRODUCTION

SA✓

Do NOT Gen

1 AN ACT...; relating to: the budget.

Analysis by the Legislative Reference Bureau

HEALTH AND HUMAN SERVICES

OTHER HEALTH AND HUMAN SERVICES

Under current law, a long-term care provider, such as a residential care facility or a personal care worker agency, must obtain the Wisconsin arrest and conviction record of each caregiver who works for the provider. A provider may not employ or contract with a caregiver who has been convicted of a serious crime. If a caregiver is not a Wisconsin resident or resided outside Wisconsin before serving as a caregiver, a provider may request that the caregiver provide fingerprints that may be used to search criminal history records maintained by the Federal Bureau of Investigation (FBI). → JWS 1/

This bill provides that if a long-term care provider obtains information from the FBI regarding a caregiver's arrest or conviction record, the provider may use the information only to determine whether the caregiver is disqualified from serving as a caregiver. The bill further provides that a provider is immune from civil liability to a caregiver for using arrest and conviction information provided by the FBI to make an employment determination regarding the caregiver. The limitation on use of arrest and conviction information and the civil immunity provision apply only to use of arrest and conviction information that a provider requests from the FBI before September 30, 2007.

JWS

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

2-1
1 SECTION 1. 50.065 (2) (br) of the statutes is created to read:

2 50.065 (2) (br) 1. Except as provided in subd. 2, an entity that receives
3 information regarding the arrest or conviction of a caregiver from the federal bureau
4 of investigation in connection with a criminal history search under this section may
5 use the information only to determine whether the caregiver's arrest or conviction
6 record disqualifies him or her from serving as a caregiver. An entity is immune from
7 civil liability to a caregiver for using arrest or conviction information provided by the
8 federal bureau of investigation to make an employment determination regarding the
9 caregiver.

10 2. Subdivision 1. does not apply to use by an entity of arrest or conviction
11 information that the entity requests from the federal bureau of investigation after

12 September 30, 2007.

13 INS 2-12

(END)

**2005-2006 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-1744/2ins

RLR:.....

Ins 1:

A provider may share criminal history information concerning a caregiver with other providers.

Ins 2

(A provider may still share criminal history information concerning a caregiver with other providers.)

Ins 2-1:

SECTION 1. 50.065 (2) (bg) of the statutes is amended to read:

50.065 (2) (bg) If an entity hires or contracts with a caregiver for whom, within the last 4 years, the information required under par. (b) 1. to 3. and 5. has already been obtained by another entity, the entity may obtain that information from that other entity, which, notwithstanding par. (bg), ^{br} shall provide the information, if possible, to the requesting entity. If an entity cannot obtain the information required under par. (b) 1. to 3. and 5. from another entity or if an entity has reasonable grounds to believe that any information obtained from another entity is no longer accurate, the entity shall obtain that information from the sources specified in par. (b) 1. to 3. and 5.

History: 1997 a. 27, 105, 237; 1999 a. 9, 32, 56, 185, 186; 2001 a. 109.

Ins 2-12:

SECTION 9321. Initial applicability; health and family service.

(1) CAREGIVER CRIMINAL HISTORY SEARCHES. The treatment of sections 50.065 (2) (bg) and (br) of the statutes first applies to arrest and conviction information requested on the effective date of this subsection.



State of Wisconsin
2005 - 2006 LEGISLATURE

LRB-1744/2

RLR:cjs:rs

DOA:.....Milioto – BB0440 FBI background check for caregivers
FOR 2005-07 BUDGET -- NOT READY FOR INTRODUCTION

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5 other entity, which, notwithstanding par. (br), shall provide the information, if
6 possible, to the requesting entity. If an entity cannot obtain the information required
7 under par. (b) 1. to 3. and 5. from another entity or if an entity has reasonable grounds
8 to believe that any information obtained from another entity is no longer accurate,
9 the entity shall obtain that information from the sources specified in par. (b) 1. to 3.
10 and 5.

11 **SECTION 2.** 50.065 (2) (br) of the statutes is created to read:

12 50.065 (2) (br) 1. Except as provided in subd. 2, an entity that receives
13 information regarding the arrest or conviction of a caregiver from the federal bureau
14 of investigation in connection with a criminal history search under this section may
15 use the information only to determine whether the caregiver's arrest or conviction
16 record disqualifies him or her from serving as a caregiver. An entity is immune from
17 civil liability to a caregiver for using arrest or conviction information provided by the
18 federal bureau of investigation to make an employment determination regarding the
19 caregiver.

2. Subdivision 1. does not apply to use by an entity of arrest or conviction information that the entity requests from the federal bureau of investigation after September 30, 2007.

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(1) CAREGIVER CRIMINAL HISTORY SEARCHES. The treatment of section 50.065 (2) (bg) and (br) of the statutes first applies to arrest and conviction information requested on the effective date of this subsection.

(END)